



Criminal Defense Attorneys of Michigan

P.O. Box 18098, Lansing, MI 48901-8098 • 517-579-0533 • www.cdamonline.org

OFFICERS:

James R. Samuels
President

Penny R. Beardslee
First Vice President

Patricia A. Maceroni
Second Vice President

Beth LaCosse,
Secretary

Steven I. Moss,
Treasurer

Margaret Sind Raben,
Immediate Past President

September 30, 2011

Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48090

BOARD MEMBERS:

Lynn D'Orio

Robyn Frankel

Stuart G. Friedman

Rhonda B. Ives

Thomas M. Loeb

Karl P. Numinem

Lisa Kirsch-Satawa

Barbara A. Klimaszewski

Elizabeth A. LaCosse

Marjorie P. Russell

Mark A. Satawa

Nicole L. Smith

Michael L. Steinberg

Richard D. Stroba

William W. Swor

Dawn Van Hoek

Rafael Villarruel

Robert S. Whims

Re: Administrative File No. 2008-36
Proposed Amendment of Rule 7.202 of the Michigan Court Rules or
Proposed Adoption of Administrative Order No. 2011-XX

Dear Mr. Davis,

I am writing on behalf of the Rules and Laws Committee of the Criminal Defense Attorneys of Michigan to oppose the proposed amendment of MCR 7.202.

We are in complete agreement with the reasons for objection laid out in the September 26, 2011 letter to you authored by Dawn Van Hoek, Director of the Michigan State Appellate Defender Office. It should initially be pointed out that, as noted by the staff comment, both of the proposals referenced above were "prompted by the Court's decision in *People v Richmond*, 486 Mich 29, (2010), in which the Court held that a prosecutor's decision to move to dismiss the prosecutor's case makes the case moot on appeal." However, the Court, in a follow-up order in the *Richmond* case, while instructing the prosecutor how to proceed, indicated that the "voluntary" dismissal request was "at most, a procedural misstep" *People v Richmond*, 486 Mich 1041; 783 NW2d 703 (2010). While this language was later removed by the Court, *People v Richmond*, __ Mich __; 784 NW2d 204 (Mich, 2010), the fact remains that the prosecutor can easily avoid this problem in any case by not misstepping, allowing the trial court to dismiss on its own or pursuant to a defense motion. See *People v Cischke*, unpublished opinion per curiam of the Court of Appeals, decided July 26, 2011 (Docket No. 297702, 2011 WL 3117683).

As pointed out by Director Van Hoek in her September 26, 2011 letter, the proposal to alter MCR 7.202 to allow the prosecutor an appeal of right in every circumstance where he or she certifies the importance of the evidence at issue, will infringe on the separation of powers, re-write legislation, and will ultimately slow the entire process. Due to the ease of the "cure," this Court should not alter Michigan rules and laws in such problematic ways.

EXECUTIVE DIRECTOR

Yvonne K. Fleener

EDUCATION DIRECTOR:

F. Randall Karfonta

Rules and Laws Committee

John Shea
Margaret Raben
Dawn Van Hoek

Finally, with respect to the proposed alteration of MCR 7.202, allowing the prosecutor, through "certification," to define a final judgment, turns over an essential element of the appellate process to a party without any ability on the part of the opposing party to object or answer. Such a move substantially hampers the operation of the adversarial system, and constitutes a major ceding of power by the courts to one party in the criminal litigation process. If indeed the Court sees fit to make this change, it should consider allowing trial defense counsel to certify the denial of a motion to suppress as a final judgment if it involves evidence without which the prosecution could not possibly prevail at trial.

As to the B alternative, the issuance of an administrative order by the Court to allow for mandatory stay grants while the prosecution pursues a leave application, the Rules and Laws Committee of the Criminal Defense Attorneys of Michigan feels this is less problematic. However, in addition to the concern expressed by Director Van Hoek in her September 26, 2011 letter regarding inconsistency with MCL 765.7, with which the Rules and Laws Committee agrees, the following should be considered. First, as to timely pursuit of an appeal by leave on the part of the prosecution, more specific language, with substantial sanctions for violation, should be considered. Second, again, there is no reason the two sides in the criminal litigation process should be treated differently. While the prosecution indeed has a double jeopardy concern, the defense has equivalent concerns based in speedy trial rights, and the danger of undue harassment, anxiety, and lengthy pre-conviction incarceration. Therefore, the second sentence in the final paragraph of the proposed administrative order should be changed to read as follows: "Therefore, in a criminal case in which a prosecutor's evidence has been suppressed, or in which a defense request to suppress evidence has been denied, and where the prosecution or defense desires to appeal that ruling, the trial court or Court of Appeals shall grant a stay of proceedings at the request of the prosecution or defense, pending resolution of the prosecution or defense application for leave to appeal."

Sincerely,

Handwritten signature of F. Martin Tieber in black ink, written in a cursive style.

F. Martin Tieber

Past President, Criminal Defense Attorneys of Michigan